INSOL INTERNATIONAL

GLOBAL INSOLVENCY PRACTICE COURSE

2022 / 2023

Session 5 Materials – Introduction to the UNCITRAL Model Laws Relating to Insolvency

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INSOL INTERNATIONAL

GLOBAL INSOLVENCY PRACTICE COURSE

INSOL – Global Insolvency Practice Course – Module A

UNCITRAL MODEL LAW: AN INTRODUCTION - Exercise

Prof. G. Ray Warner

Dear Colleagues-

I will only have a brief session in which to introduce you to the Model Law on Cross-Border Insolvency so it is important that you read the assigned materials in advance. The Model Law is fairly short so it will be easy to read the entire document. In addition, I would like you to focus on a few issues in advance of our session. This exercise is designed to help you do that so please also complete it in advance of our session.

Exercise One - Please (1) read the definition of "Foreign Main Proceeding" in Article 2 of the Model Law and (2) read the *OAS* opinion interpreting "center of main interest" under the US version (Chapter 15) and (3) read the excerpt from the new recast EU Insolvency Regulation [recitals 27 – 31 and Article 3(1)] and (4) read the *Interedil Srl* opinion interpreting "centre of main interest" under the prior version of the EU Regulation. Does the *Iteredil* opinion and the EU Regulation adopt the same test for center of main interest as the *OAS* opinion?

Exercise Two – How important is COMI? Please read Articles 19, 20 and 21 of the Model Law. What relief is available for the representative of a Foreign Mani Proceeding that is **not** available for the representative of a Foreign Non-Main Proceeding? Please read Articles 28, 30 and 31of the Model Law. What is the effect of recognizing the foreign proceeding as a Foreign Main Proceeding?

Exercise Three – Please read Articles 21(1 & 2) and 22(1 & 2). Is the court required to grant any relief to the Foreign Representative? If relief is not mandatory, then what standard applies to the grant of relief?

Exercise Four – Article 21(1) states that the court may "grant any appropriate relief, including [a list of items (a) through (f)] … (g) Granting any additional relief that may be available to [a local insolvency administrator] under the laws of this State." How should this language be read? Can the court grant relief that would not be available to a local insolvency administrator? Must the relief granted be relief that would be available to an insolvency administrator under the laws of the State where the foreign proceeding is pending?

REGULATION (EU) 2015/848
OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 20 May 2015 on insolvency proceedings (recast)

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Whereas:

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(27) Before opening insolvency proceedings, the competent court should examine of its own motion whether the centre of the debtor's main interests or the debtor's establishment is actually located within its jurisdiction.

(28) When determining whether the centre of the debtor's main interests is ascertainable by third parties, special consideration should be given to the creditors and to their perception as to where a debtor conducts the administration of its interests. This may require, in the event of a shift of centre of main interests, informing creditors of the new location from which the debtor is carrying out its activities in due course, for example by drawing attention to the change of address in commercial correspondence, or by making the new location public through other appropriate means.

(29) This Regulation should contain a number of safeguards aimed at preventing fraudulent or abusive forum shopping.

(30) Accordingly, the presumptions that the registered office, the principal place of business and the habitual residence are the centre of main interests should be rebuttable, and the relevant court of a Member State should carefully assess whether the centre of the debtor's main interests is genuinely located in that Member State. In the case of a company, it should be possible to rebut this presumption where the company's central administration is located in a Member State other than that of its registered office, and where a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State. In the case of an individual not exercising an independent business or professional activity, it should be possible to rebut this presumption, for example where the major part of the debtor's assets is located outside the Member State of the debtor's habitual residence, or where it can be established that the principal reason for moving was to file for insolvency proceedings in the new jurisdiction and where such filing would materially impair the interests of creditors whose dealings with the debtor took place prior to the relocation.

(31) With the same objective of preventing fraudulent or abusive forum shopping, the presumption that the centre of main interests is at the place of the registered office, at the individual's principal place of business or at the individual's habitual residence should not apply where, respectively, in the case of a company, legal person or individual exercising an independent business or professional activity, the debtor has relocated its registered office or principal place of business to another Member State within the 3-month period prior to the

request for opening insolvency proceedings, or, in the case of an individual not exercising an independent business or professional activity, the debtor has relocated his habitual residence to another Member State within the 6-month period prior to the request for opening insolvency proceedings.

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Article 3
International jurisdiction

1. The courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings (‘main insolvency proceedings’). The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.

In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. That presumption shall only apply if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings.

In the case of an individual exercising an independent business or professional activity, the centre of main interests shall be presumed to be that individual's principal place of business in the absence of proof to the contrary. That presumption shall only apply if the individual's principal place of business has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings.

In the case of any other individual, the centre of main interests shall be presumed to be the place of the individual's habitual residence in the absence of proof to the contrary. This presumption shall only apply if the habitual residence has not been moved to another Member State within the 6-month period prior to the request for the opening of insolvency proceedings.

UNCITRAL Model Law on Cross-Border Insolvency

PREAMBLE

The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:

(a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;

(b) Greater legal certainty for trade and investment;

(c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;

(d) Protection and maximization of the value of the debtor's assets; and

(e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application

1. This Law applies where:

(a) Assistance is sought in this State by a foreign court or a foreign representative in connection with a foreign proceeding; or

(b) Assistance is sought in a foreign State in connection with a proceeding under [*identify laws of the enacting State relating to insolvency*]; or

(c) A foreign proceeding and a proceeding under [*identify laws of the enacting State relating to insolvency*] in respect of the same debtor are taking place concurrently; or

(d) Creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participating in, a proceeding under [*identify laws of the enacting State relating to insolvency*].

2. This Law does not apply to a proceeding concerning [*designate any types of entities, such as banks or insurance companies, that are subject to a special insolvency regime in this State and that this State wishes to exclude from this Law*].

Article 2. Definition

For the purposes of this Law:

(a) "Foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;

(b) "Foreign main proceeding" means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;

(c) "Foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph *(f)* of this article;

(d) "Foreign representative" means a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;

(e) "Foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding;

(f) "Establishment" means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.

Article 3. International obligations of this State

To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail.

Article 4. [Competent court or authority][a]

The functions referred to in this Law relating to recognition of foreign proceedings and cooperation with foreign courts shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting State*].

Article 5. Authorization of [insert the title of the person or body administering reorganization or liquidation under the law of the enacting State] *to act in a foreign State*

A [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] is authorized to act in a foreign State on behalf of a proceeding under [*identify laws of the enacting State relating to insolvency*], as permitted by the applicable foreign law.

Article 6. Public policy exception

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.

Article 7. Additional assistance under other laws

Nothing in this Law limits the power of a court or a [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] to provide additional assistance to a foreign representative under other laws of this State.

Article 8. Interpretation

In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

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[a] A state where certain functions relating to insolvency proceedings have been conferred upon government-appointed officials of bodies might wish to include in article 4 or elsewhere in chapter I the following provision:

Nothing in this Law affects the provisions in force in the State governing the authority of [*insert the title of the government-appointed person or body*].

CHAPTER II. ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS TO COURTS IN THIS STATE

Article 9. Right of direct access

A foreign representative is entitled to apply directly to a court in this State.

Article 10. Limited jurisdiction

The sole fact that an application pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the application.

Article 11. Application by a foreign representative to commence a proceeding under [identify laws of the enacting State relating to insolvency]

A foreign representative is entitled to apply to commence a proceeding under [*identify laws of the enacting State relating to insolvency*] if the conditions for commencing such a proceeding are otherwise met.

Article 12. Participation of a foreign representative in a proceeding under [identify laws of the enacting State relating to insolvency]

Upon recognition of a foreign proceeding, the foreign representative is entitled to participate in a proceeding regarding the debtor under [*identify laws of the enacting State relating to insolvency*].

Article 13. Access of foreign creditors to a proceeding under [identify laws of the enacting State relating to insolvency]

1. Subject to paragraph 2 of this article, foreign creditors have the same rights regarding the commencement of, and participation in, a proceeding under [*identify laws of the enacting State relating to insolvency*] as creditors in this State.

2. Paragraph 1 of this article does not affect the ranking of claims in a proceeding under [*identify laws of the enacting State relating to*

insolvency], except that the claims of foreign creditors shall not be ranked lower than [*identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the general non-preference claims*].[b]

Article 14. Notification to foreign creditors of a proceeding under [identify laws of the enacting State relating to insolvency]

1. Whenever under [*identify laws of the enacting State relating to insolvency*] notification is to be given to creditors in this State, such notification shall also be given to the known creditors that do not have addresses in this State. The court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known.

2. Such notification shall be made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate. No letters rogatory or other, similar formality is required.

3. When a notification of commencement of a proceeding is to be given to foreign creditors, the notification shall:

(a) Indicate a reasonable time period for filing claims and specify the place for their filing

(b) Indicate whether secured creditors need to file their secured claims; and

(c) Contain any other information required to be included in such a notification to creditors pursuant to the law of this State and the orders of the court.

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[b] The enacting State may wish to consider the following alternative wording to replace paragraph 2 of article 13:

"2. Paragraph 1 of this article does not affect the ranking of claims in a proceeding under [*identify laws of the enacting State relating to insolvency*] or the exclusion of foreign tax and social security claims from such a proceeding. Nevertheless, the claims of foreign creditors other than those concerning tax and social security obligations shall not be ranked lower than [*identify the class of general non-preference claims, while providing that a foreign claim is to be ranked lower than the general non-preference claims if an equivalent local claim (e.g. claim for a penalty or deferred-payment claim) has a rank lower than the general non-preference claims*]."

CHAPTER III. RECOGNITION OF A FOREIGN PROCEEDING AND RELIEF

Article 15. Application for recognition of a foreign proceeding

1. A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.

2. An application for recognition shall be accompanied by:

(a) A certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or

(b) A certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or

(c) In the absence of evidence referred to in subparagraphs *(a)* and *(b)*, any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.

3. An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

4. The court may require a translation of documents supplied in support of the application for recognition into an official language of this State.

Article 16. Presumptions concerning recognition

1. If the decision or certificate referred to in paragraph 2 of article 15 indicates that the foreign proceeding is a proceeding within the meaning of subparagraph *(a)* of article 2 and that the foreign representative is a person or body within the meaning of subparagraph *(d)* of article 2, the court is entitled to so presume.

2. The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.

3. In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.

Article 17. Decision to recognize a foreign proceeding

1. Subject to article 6, a foreign proceeding shall be recognized if:

(a) The foreign proceeding is a proceeding within the meaning of subparagraph *(a)* of article 2;

(b) The foreign representative applying for recognition is a person or body within the meaning of subparagraph *(d)* of article 2;

(c) The application meets the requirements of paragraph 2 of article 15; and

(d) The application has been submitted to the court referred to in article 4.

2. The foreign proceeding shall be recognized:

(a) As a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or

(b) As a foreign non-main proceeding if the debtor has an establishment within the meaning of subparagraph *(f)* of article 2 in the foreign State.

3. An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.

4. The provisions of articles 15, 16, 17 and 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

Article 18. Subsequent information

From the time of filing the application for recognition of the foreign proceeding, the foreign representative shall inform the court promptly of:

(a) Any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative's appointment; and

(b) Any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.

Article 19. Relief that may be granted upon application for recognition of a foreign proceeding

1. From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the foreign

representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including:

(a) Staying execution against the debtor's assets;

(b) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;

(c) Any relief mentioned in paragraph 1 *(c)*, *(d)* and *(g)* of article 21.

2. [*Insert provisions (or refer to provisions in force in the enacting State) relating to notice*.]

3. Unless extended under paragraph 1 *(f)* of article 21, the relief granted under this article terminates when the application for recognition is decided upon.

4. The court may refuse to grant relief under this article if such relief would interfere with the administration of a foreign main proceeding.

Article 20. Effects of recognition of a foreign main proceeding

1. Upon recognition of a foreign proceeding that is a foreign main proceeding:

(a) Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;

(b) Execution against the debtor's assets is stayed; and

(c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

2. The scope, and the modification or termination, of the stay and suspension referred to in paragraph 1 of this article are subject to [*refer to any provisions of law of the enacting State relating to insolvency that apply to exceptions, limitations, modifications or termination in respect of the stay and suspension referred to in paragraph 1 of this article*].

3. Paragraph 1 *(a)* of this article does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor.

4. Paragraph 1 of this article does not affect the right to request the commencement of a proceeding under [*identify laws of the enacting State relating to insolvency*] or the right to file claims in such a proceeding.

Article 21. Relief that may be granted upon recognition of a foreign proceeding

1. Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including:

(a) Staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1 *(a)* of article 20;

(b) Staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1 *(b)* of article 20;

(c) Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1 *(c)* of article 20;

(d) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;

(e) Entrusting the administration or realization of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court;

(f) Extending relief granted under paragraph 1 of article 19;

(g) Granting any additional relief that may be available to [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] under the laws of this State.

2. Upon recognition of a foreign proceeding, whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected.

3. In granting relief under this article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

Article 22. Protection of creditors and other interested persons

1. In granting or denying relief under article 19 or 21, or in modifying or terminating relief under paragraph 3 of this article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.

2. The court may subject relief granted under article 19 or 21 to conditions it considers appropriate.

3. The court may, at the request of the foreign representative or a person affected by relief granted under article 19 or 21, or at its own motion, modify or terminate such relief.

Article 23. Actions to avoid acts detrimental to creditors

1. Upon recognition of a foreign proceeding, the foreign representative has standing to initiate [*refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available in this State to a person or body administering a reorganization or liquidation*].

2. When the foreign proceeding is a foreign non-main proceeding, the court must be satisfied that the action relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding.

Article 24. Intervention by a foreign representative in proceedings in this State

Upon recognition of a foreign proceeding, the foreign representative may, provided the requirements of the law of this State are met, intervene in any proceedings in which the debtor is a party.

CHAPTER IV. COOPERATION WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES

Article 25. Cooperation and direct communication between a court of this State and foreign courts or foreign representatives

1. In matters referred to in article 1, the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*].

2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.

Article 26. Cooperation and direct communication between the [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] *and foreign courts or foreign representatives*

1. In matters referred to in article 1, a [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts or foreign representatives.

2. The [*insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State*] is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with foreign courts or foreign representatives.

Article 27. Forms of cooperation

Cooperation referred to in articles 25 and 26 may be implemented by any appropriate means, including:

(a) Appointment of a person or body to act at the direction of the court;

(b) Communication of information by any means considered appropriate by the court;

(c) Coordination of the administration and supervision of the debtor's assets and affairs;

(d) Approval or implementation by courts of agreements concerning the coordination of proceedings;

(e) Coordination of concurrent proceedings regarding the same debtor;

(f) [*The enacting State may wish to list additional forms or examples of cooperation*].

CHAPTER V. CONCURRENT PROCEEDINGS

Article 28. Commencement of a proceeding under [identify laws of the enacting State relating to insolvency] *after recognition of a foreign main proceeding*

After recognition of a foreign main proceeding, a proceeding under [*identify laws of the enacting State relating to insolvency*] may be commenced only if the debtor has assets in this State; the effects of that proceeding shall be restricted to the assets of the debtor that are located in this State and, to the extent necessary to implement cooperation and coordination under articles 25, 26 and 27, to other assets of the debtor that, under the law of this State, should be administered in that proceeding.

Article 29. Coordination of a proceeding under [identify laws of the enacting State relating to insolvency] *and a foreign proceeding*

Where a foreign proceeding and a proceeding under [*identify laws of the enacting State relating to insolvency*] are taking place concurrently regarding the same debtor, the court shall seek cooperation and coordination under articles 25, 26 and 27, and the following shall apply:

(a) When the proceeding in this State is taking place at the time the application for recognition of the foreign proceeding is filed

(i) Any relief granted under article 19 or 21 must be consistent with the proceeding in this State; and

(ii) If the foreign proceeding is recognized in this State as a foreign main proceeding, article 20 does not apply;

(b) When the proceeding in this State commences after recognition, or after the filing of the application for recognition, of the foreign proceeding,

(i) Any relief in effect under article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the proceeding in this State; and

(ii) If the foreign proceeding is a foreign main proceeding, the stay and suspension referred to in paragraph 1 of article 20 shall be modified or terminated pursuant to paragraph 2 of article 20 if inconsistent with the proceeding in this State;

(c) In granting, extending or modifying relief granted to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding or concerns information required in that proceeding.

Article 30. Coordination of more than one foreign proceeding

In matters referred to in article 1, in respect of more than one foreign proceeding regarding the same debtor, the court shall seek cooperation and coordination under articles 25, 26 and 27, and the following shall apply:

(a) Any relief granted under article 19 or 21 to a representative of a foreign non-main proceeding after recognition of a foreign main proceeding must be consistent with the foreign main proceeding;

(b) If a foreign main proceeding is recognized after recognition, or after the filing of an application for recognition, of a foreign non-main proceeding, any relief in effect under article 19 or 21 shall be reviewed by the court and shall be modified or terminated if inconsistent with the foreign main proceeding;

(c) If, after recognition of a foreign non-main proceeding, another foreign non-main proceeding is recognized, the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.

Article 31. Presumption of insolvency based on recognition of a foreign main proceeding

In the absence of evidence to the contrary, recognition of a foreign main proceeding is, for the purpose of commencing a proceeding under [*identify laws of the enacting State relating to insolvency*], proof that the debtor is insolvent.

Article 32. Rule of payment in concurrent proceedings

Without prejudice to secured claims or rights *in rem*, a creditor who has received part payment in respect of its claim in a proceeding pursuant

to a law relating to insolvency in a foreign State may not receive a payment for the same claim in a proceeding under [*identify laws of the enacting State relating to insolvency*] regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.

533 B.R. 83
United States Bankruptcy Court,
S.D. New York.

In re: OAS S.A., et al.,[1] Debtors in Foreign Proceedings.

Case No. 15–10937 (SMB) (Jointly Administered)
|
Signed July 13, 2015

STUART M. BERNSTEIN, United States Bankruptcy Judge:

Renato Fermiano Tavares, as proposed foreign representative, requests recognition of three foreign proceedings pending in Brazil as foreign main proceedings pursuant to chapter 15 of the United States Bankruptcy Code. (*See Verified Petition for Recognition of Brazilian Bankruptcy Proceedings and Motion for Order Granting Related Relief Pursuant to 11 U.S.C. §§ 1515, 1517, 1520 and 1521,* dated Apr. 15, 2015 (ECF Doc. # 3) (together with the *Voluntary Petitions for each debtor,* dated Apr. 15, 2015, filed in Adv. Pro. Nos. 15–10937 through 15–10940).) The foreign debtors—OAS S.A. ("OAS"), Construtora OAS S.A. ("Construtora") and OAS Investments GmbH ("OAS Investments," and together with OAS and Construtora, collectively, the "OAS Debtors")[2]—are currently debtors in judicial reorganization proceedings (the "Brazilian Bankruptcy Proceedings") pending in the First Specialized Bankruptcy Court of São Paulo (the "Brazilian Court") pursuant to Federal Law No. 11.101 of February 9, 2005 of the laws of the Federative Republic of Brazil (the "Brazilian Bankruptcy Law"). The Court conducted an evidentiary hearing on May 19, 2015 (the "Recognition Hearing")[3] and concludes based upon the factual findings and legal conclusions that follow that the OAS Debtors' petitions for recognition as foreign main proceedings are granted.

BACKGROUND

A. The OAS Debtors

The OAS Debtors are part of the OAS Group. The OAS Group consists of infrastructure companies that focus on heavy engineering and equity investments in infrastructure projects located in and outside Brazil, and provides a range of services that includes public concessions, construction, engineering, planning, execution and works management for the transportation, power, sanitation, infrastructure and real estate industries, providing services in twenty-two countries in Latin America, the Caribbean and Africa. (*Declaration of Re nato Fermiano Tavares Pursuant to 28 U.S.C. § 1746 in Support of Verified Petition for Recognition of Brazilian Bankruptcy Proceedings and Motion for Order Granting Related Relief Pursuant to 11 U.S.C. §§ 1515, 1517, 1520 and 1521,* dated Apr. 15, 2015 ("*Tavares Declaration* ") at ¶ 9 (ECF Doc. # 4).)[4] Its principal operating activities are organized into two major divisions: engineering, which engages in heavy civil engineering and construction projects, and investments, which is focused on private investments in infrastructure and public and private services concessions. (*Id.*)

Most of the OAS Group's foreign construction contracts are with the national governments of countries in Latin America and Africa and relate to the construction of, among other things, highways, hospitals, water and sewage systems and affordable housing. (*Id.* at ¶ 10.) The OAS Group's domestic construction contracts are with private companies holding concessions, other private companies and the federal and local Brazilian governments. (*Id.*) The OAS Group employs, directly or indirectly, approximately 110,000 people. (*Id.*)

OAS, as the holding company, sits at the apex of the OAS Group. (*Id.* at ¶ 12.) It directly or indirectly owns 100% of the share capital of Construtora, the holding company atop the engineering division. (*Id.* at ¶¶ 12–13.) Construtora, through its subsidiaries and branches, conducts business in Brazil, Peru, Trinidad and Tobago, Ghana, Uruguay, Chile, Honduras, Argentina, Bolivia, Colombia, Mozambique, Guinea, Ecuador, Equatorial Guinea, Haiti, Costa Rica, Panama, Angola, and Guatemala. (*Id.* at ¶ 13.) Its operations in Brazil consist of more than eighty construction projects that generate more revenue for Construtora than its operations in any other country. (*Id.*)

OAS Investments maintains its registered office in Vienna, Austria, and is directly and wholly-owned by OAS. (*Id.* at ¶ 15.) Pursuant to its articles of association, its principal corporate purpose is the financing of the operations of the OAS Group. (OASX 27, at 113; OASX 28, at 118.)[5] In or

around October 2012, OAS Investments issued $500 million of 8.25% senior notes due 2019 (the "2019–1 Notes"). The 2019–1 Notes were guaranteed by OAS, Construtora, and OAS Investimentos, S.A. ("Investimentos"). (OASX 27, at 122, 123.) Investimentos, a Brazilian company, is not one of the OAS Debtors seeking recognition and should not be confused with OAS Investments, the note issuer. The OAS Group intended to use the proceeds to refinance a substantial portion of its existing debt, fund certain capital expenditures, and use the remainder for general corporate purposes. (OASX 27, at 45.) The 2019–1 Notes were governed by New York law. (*See* OASX 27, at v.)

In or around October 2013, OAS Investments issued an additional $375 million of 8.25% senior notes due 2019 (the "2019–2 Notes" and together with the 2019–1 Notes, the "2019 Notes"; holders of the 2019 Notes are referred to herein as the "2019 Noteholders"). The 2019–2 Notes were guaranteed, again by OAS, Construtora, and Investimentos. (OASX 28, at 128.) The OAS Group intended to use the proceeds to refinance a substantial portion of its existing debt. (OASX 28, at 48.) The 2019–2 Notes were also governed by New York law. (*See* OASX 28, at vi.)

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3. The Brazilian Bankruptcy Proceedings

On March 31, 2015, the OAS Debtors together with other OAS affiliates (collectively, the "Brazilian Debtors") commenced the Brazilian Bankruptcy Proceedings under Brazilian Bankruptcy Law. (*See* AAX 27.) On April 1, 2015, the Brazilian Court issued a decision and order approving the continuation of the joint reorganization proceedings. (*See* Decision, Proceeding No. 1030812–77.2015.8.26.0100, 1st District Bankruptcy and Judicial Reorganization Court, São Paulo, Brazil, Apr. 1, 2015 (OASX 1, OASX 2 (English Translation).)) The Brazilian Court observed that although Brazil had not yet adopted the UNCITRAL Model Code, the center of main interests of OAS was Brazil, and the Brazilian Debtors, including those incorporated abroad, were part of the same economic group controlled from Brazil.

***

C. The Chapter 15 Cases

On April 2, 2015, the Board of Directors of OAS, Construtora, OAS Finance and OAS Investments resolved to grant Tavares a power of attorney for one year to represent the entities with respect to their judicial reorganization proceedings before the Brazilian Court and administer the reorganization of the debtors' assets and affairs in the Brazilian Bankruptcy Proceedings. In addition, the Boards of Directors specifically appointed Tavares as the OAS Debtors' agent and attorney-in-fact for the purpose of seeking relief available to a "foreign representative" under chapter 15 of the United States Bankruptcy Code. The resolutions were accompanied by powers of attorney evidencing his authority. (OASX 3, 4.)

On April 15, 2015, Tavares commenced the chapter 15 cases and sought immediate relief in the form of an injunction against continued litigation and collection efforts. (*Motion for Provisional Relief Pursuant to Section 1519 of the Bankruptcy Code,* dated Apr. 15, 2015 (ECF Doc. # 7).) Aurelius and Alden objected to the provisional relief. (*See Noteholders' Objection to Motion for Provisional Relief Pursuant to Section 1519 of the Bankruptcy Code,* dated Apr. 17, 2015 (ECF Doc. # 17).) At the hearing, the Court granted the relief but only in part.

On May 15, 2015, Aurelius and Alden filed their *Objection to Petition for Recognition,* dated May 15, 2015 (ECF Doc. # 60). The objection and the ensuing Recognition Hearing identified four areas of dispute. *** Third, OAS Investments' center of main interests was in Vienna, and its Brazilian reorganization could not be recognized as a foreign main or non-main proceeding.

***

DISCUSSION

A. Introduction

Congress adopted chapter 15 as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Chapter 15 incorporates the Model Law on Cross–Border Insolvency (the "Model Law") promulgated by the United Nations Commission on International Trade Law ("UNCITRAL"). 11 U.S.C. § 1501(a); *see Morning Mist Holdings Ltd. v. Krys* (*In re Fairfield Sentry Ltd.*), 714 F.3d 127, 132 (2d Cir.2013) ("*Fairfield Sentry* "); *Ad Hoc Grp. of Vitro Noteholders v. Vitro S.A.B. de C.V.* (*In re Vitro S.A.B. de C.V.*), 701 F.3d 1031, 1043 (5th Cir.2012) ("*Vitro* "), *cert. dismissed,* —— U.S. ——, 133 S.Ct. 1862, 185 L.Ed.2d 862 (2013). Chapter 15 is intended to promote "cooperation between United States courts, trustees, examiners, debtors and debtors in possession and the courts and other competent authorities of foreign countries; greater legal certainty for trade and investment; fair and efficient administration of cross-border insolvencies that

protects the interests of all creditors and other interested entities, including the debtor; the protection and maximization of the debtor's assets; and the facilitation of the rescue of financially troubled businesses." *In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.,* 374 B.R. 122, 126 (Bankr.S.D.N.Y.2007), *aff'd,* 389 B.R. 325 (S.D.N.Y.2008); *accord* 11 U.S.C. § 1501(a).

"In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions." 11 U.S.C. § 1508. "As each section of Chapter 15 is based on a corresponding article in the Model Law, if a textual provision of Chapter 15 is unclear or ambiguous, the Court may then consider the Model Law and foreign interpretations of it as part of its 'interpretive task.' " *O'Sullivan v. Loy* (*In re Loy*), 432 B.R. 551, 560 (E.D.Va.2010) (footnote omitted) (citing 11 U.S.C. § 1508); *accord Fairfield Sentry,* 714 F.3d at 136; *Fogerty v. Petroquest Res., Inc.* (*In re Condor Ins. Ltd.*), 601 F.3d 319, 321 (5th Cir.2010). When interpreting Chapter 15, the Court should also consult the GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON CROSS–BORDER INSOLVENCY (the "GUIDE") promulgated by UNCITRAL. *See* H.R.REP. NO. 109–31, at 105 (2005); LEIF M. CLARK, ANCILLARY & OTHER CROSS–BORDER INSOLVENCY CASES UNDER CHAPTER 15 OF THE BANKRUPTCY CODE § 3[1][a][i], at 17 (2008).

Bankruptcy Code § 1517 states the grounds for granting recognition:

> (a) Subject to section 1506, after notice and a hearing, an order recognizing a foreign proceeding shall be entered if—
>
> (1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502;
>
> (2) the foreign representative applying for recognition is a person or body; and
>
> (3) the petition meets the requirements of section 1515.

Section 1517(b) clarifies the distinction between foreign main and nonmain proceedings referred to in § 1517(a)(1):

> (b) Such foreign proceeding shall be recognized—
>
> (1) as a foreign main proceeding if it is pending in the country where the debtor has the center of its main interests; or
>
> (2) as a foreign nonmain proceeding if the debtor has an establishment within the meaning of section 1502 in the foreign country where the proceeding is pending.

The parties agree that OAS and Construtora maintain their center of main interests ("COMI") in Brazil.[8] They are registered in Brazil where they maintain their main offices, and their registration creates a rebuttable presumption that Brazil is their COMI. 11 U.S.C. § 1516(c). Furthermore, the earlier description of their activities, which are predominantly in Brazil, confirms that their COMI is in Brazil. Aurelius and Alden do, however, dispute that OAS Investments' COMI is in Brazil.

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C. The COMI of OAS Investments

Tavares seeks recognition of the OAS Investments' Brazilian Bankruptcy Proceeding as a foreign main proceeding.[15] A " 'foreign main proceeding' means a foreign proceeding pending in the country where the debtor has the center of its main interests," 11 U.S.C. § 1502(4), or COMI. "In the absence of evidence to the contrary, the debtor's registered office ... is presumed to be the center of the debtor's main interests." 11 U.S.C. § 1516(c). "[A] debtor's COMI is determined as of the time of the filing of the Chapter 15 petition," but, "[t]o offset a debtor's ability to manipulate its COMI, a court may also look at the time period between the initiation of the foreign liquidation proceeding and the filing of the Chapter 15 petition." *Fairfield Sentry,* 714 F.3d at 133.

The COMI analysis permits consideration of any relevant activities, including liquidation activities and administrative functions. *Id.* at 137. The following non-exclusive group of factors guides the analysis, "but consideration of these specific factors is neither required nor dispositive," *id.:*

> Various factors, singly or combined, could be relevant to such a determination: the location of the

> debtor's headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes.

Id. (quoting *In re SPhinX, Ltd.,* 351 B.R. 103, 117 (Bankr.S.D.N.Y.2006), *aff'd,* 371 B.R. 10 (S.D.N.Y.2007)). In addition, the court may consider the location of the debtor's "nerve center," "including from where the debtor's activities are directed and controlled, in determining a debtor's COMI." *Fairfield Sentry,* 714 F.3d at 138 n. 10. Finally, international sources of law that the court may consider "underscore [ ] the importance of factors that indicate regularity and ascertainability." *Id.* at 138. The party seeking recognition as a foreign main proceeding has the burden of proving that the debtor's COMI is in the jurisdiction where the foreign main proceeding is pending. *SPhinX,* 351 B.R. at 117.

As this case shows, the COMI analysis when applied to a special purpose financing vehicle proves less straightforward than the typical case. OAS Investments is incorporated in Austria, and in the absence of contrary evidence, Austria is its presumed COMI. The evidence, however, indicates that it was not. OAS Investments is a subsidiary of OAS that was formed to serve as a special purpose vehicle. It issued the 2019 Notes, and then loaned the proceeds to OAS Investments (BVI), a direct OAS subsidiary, (*see* AAX 4, at 7518), which apparently loaned the proceeds to the members of the OAS Group in accordance with the uses stated in the offering memoranda. Although OAS Investments' registered office is located in Vienna, Austria, it only maintains a post office box there. (Tr. at 85:12–19.) Furthermore, it does not conduct business, own assets, have a physical location, or employ anyone in Austria. (*Tavares Declaration* at ¶ 18.) It has just a handful of trade creditors located in Austria, (AAX 4, at 7451), who provide services relating to the establishment and maintenance of OAS Investments' registered office in Austria and services required under Austrian law. (*Tavares Declaration* ¶ 18.) The predominant creditors are the beneficial holders of the 2019 Notes located worldwide.[16]

Having issued the 2019 Notes, OAS Investments had no other business except to pay them off. This was the very business it and the other Brazilian Debtors were engaged in through the Brazilian Bankruptcy Proceedings when Tavares filed the chapter 15 case on April 15, 2015. Moreover, the Brazilian Bankruptcy Proceedings provide the only realistic chance to repay the 2019 Notes. OAS Investments principal asset is a receivable owed by OAS Investments (BVI). The latter appears to be a conduit for the distribution of financing proceeds to the ultimate beneficiaries of the financing; it was not mentioned in the offering memoranda and does not appear to have any other purpose. In addition, it is currently the subject of a provisional liquidation proceeding (along with OAS Finance) in the BVI, and lacks the means to repay OAS Investments unless its own OAS Group borrowers repay that debt. In truth, the only source of repayment that will ultimately discharge the obligations to the 2019 Noteholders must come from the OAS Group pursuant to the reorganization of their financial affairs.

Brazil, in this regard, is OAS Investments' nerve center and headquarters. OAS, a Brazilian entity and its sole shareholder, has the power to elect OAS Investments' executive officers and "determine the outcome of any action requiring shareholder approval, including transactions with related parties, acquisitions and dispositions of assets and the timing and payment of any future dividends, according to the Brazilian Corporation Law." (OASX 27, at 42; OASX 28, at 44.) The offering memoranda explained that although OAS Investments was organized under the laws of Austria, "[a]ll of its directors and [OAS Group's] officers and certain advisors named herein reside in Brazil." (OASX 27, at 42; OASX 28, at 44.) There is no evidence that its Board of Directors ever convened a meeting except to pass the resolution appointing Tavares as its foreign representative, and that resolution was executed by its Brazilian directors in Brazil.[17]

The conclusion that Brazil is the nerve center and headquarters of OAS Investments is consistent with the expectation of the creditors, especially the 2019 Noteholders. The first page of each offering memoranda stated that the 2019 Notes were "unconditionally and irrevocably guaranteed by OAS S.A., Construtora OAS Ltda. and OAS Investimentos S.A. (*each organized under the laws of Brazil).*" (Emphasis in original.) The offering memoranda described OAS Investments as "a special purpose finance company and [the OAS Group's] wholly owned subsidiary," (OASX 27, at 15; OASX 28, at 17), and

"[p]ursuant to section three of [OAS Investments'] articles of association, [OAS Investments'] principal purpose is the financing of the operations of the OAS group, its affiliates and direct and indirect subsidiaries." (OASX 27, at 113; OASX 28, at 118.) The offering memoranda discussed the businesses of the OAS Group, (OASX 27, at 80–112; OASX 28, at 82–117), supplied the condensed financial statements of OAS, (OASX 27, at F–1 to F–301; OASX 28, at F–1 to F–299), and the three Brazilian guarantors, (OASX 27, at A–1 to A–11; OASX 28, at A–1 to A–10), and identified the management of OAS, Construtora and Investimentos. (OASX 27, at 114–19; OASX 28, at 119–24.) Notably, the offering memoranda did not include any financial information regarding OAS Investments, (*see* OASX 27, at 113; OASX 28, at 118), or identify its management. It is also noteworthy that any notices under the Indentures that needed to be directed to OAS Investments had to be sent to Construtora in Brazil, with copies to Investimentos, also in Brazil. (*See* OASX 31, at § 13.01.)[18] The Indentures did not require any notices to be sent to OAS Investments in Austria or anywhere else in its own name.

Most importantly, the "Risk Factors" that all note purchasers were warned to "carefully consider" before deciding to purchase the notes described the risks associated with the businesses of the OAS Group, not OAS Investments, (OASX 27, at 25–44; OASX 28, at 26–47), and included a separate discussion focusing on the special risks relating to investments that could be affected by the Brazilian economy and Brazilian government actions. (OASX 27, at 39–42; OASX 28, at 41–44.) Potential purchasers were also warned that if OAS and its subsidiaries could not pay their indebtedness, including the obligations under the guarantees, they might become subject to bankruptcy proceedings in Brazil, and Brazilian laws might be less favorable to creditors compared to the laws of the United States or other jurisdictions. (OASX 27, at 43; OASX 28, at 45.) In contrast, the offering memoranda do not discuss the risks of operating in Austria. The only risk factor that mentioned Austria stated that Austria would not enforce U.S. judgments, the U.S. securities laws or awards of punitive damages. (OASX 27, at v; OASX 28, at vi.)

In conclusion, purchasers of the 2019 Notes understood that they were investing in Brazilian-based businesses, and OAS Investments' place of incorporation, or for that matter its very existence, was immaterial to their decision to purchase their notes. While their rights were governed by New York law, (OASX 31, at § 13.08), and OAS Investments consented to the jurisdiction and service of process in New York, (*id.* at § 13.12), the purchasers expected to receive repayment from the cash generated by the operations of the OAS Group, and in the event of a default, might ultimately have to enforce their rights in a Brazilian bankruptcy proceeding. OAS Investments had no separate, ascertainable presence in Austria; it was part of, and inseparable from, the OAS Group located in Brazil. Finally, the 2019 Noteholders had no legitimate expectation that the Austrian courts would play any role in the determination or payment of their claims. For the reasons stated, the Court concludes that OAS Investments' COMI was also located in Brazil when Tavares filed its chapter 15 case.

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This decision has been edited and does not contain the full text of the original

Interedil Srl (in liquidation) v Fallimento Interedil Srl and another

(Case C-396/09) Court of Justice of the European Union 20 October 2011

[2012] Bus. L.R. 1582

President of the Chamber A Tizzano , Judges M Safjan , A Borg Barthet , M Ileši, M Berger, Advocate General J Kokott

2011 Jan 13; March 10; Oct 20

REFERENCE by the the Tribunale ordinario di Bari (Court of Bari), Italy

By an order of 6 July 2009, in proceedings between the debtor, Interedil Srl, in liquidation ("Interedil"), and the creditors, Fallimento Interedil Srl and Intesa Gestione Crediti SpA ("Intesa"), concerning a petition for bankruptcy filed by Intesa against Interedil, the Tribunale ordinario di Bari, referred to the Court of Justice for preliminary ruling under article 234EC of the EC Treaty , questions (post, para 17), on the interpretation of article 3 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L160 , p 1).

THE COURT (First Chamber) delivered the following judgment.

1 This reference for a preliminary ruling concerns the interpretation of article 3 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L160 , p 1) ("the Regulation").

2 The reference was made in proceedings between Interedil Srl, in liquidation ("Interedil"), on the one hand and Fallimento Interedil Srl and Intesa Gestione Crediti SpA ("Intesa"), of which Italfondario SpA is the successor, on the other, concerning a petition for bankruptcy filed by Intesa against Interedil.

Legal context

European Union law

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4 Article 2 of the Regulation, which deals with definitions, provides:

"For the purposes of this Regulation: (a) 'insolvency proceedings' shall mean the collective proceedings referred to in article 1(1). These proceedings are listed in

Annex A; ... (h) 'establishment' shall mean any place of operations where the debtor carries out a non-transitory economic activity with human means and goods."

5 The list in Annex A to the Regulation refers, inter alia as regards Italy, to "fallimento" (bankruptcy) proceedings.

6 Article 3 of the Regulation, which deals with international jurisdiction, provides: [the court refers to the text of Article 3 and recital (13)]

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The dispute in the main proceedings and the questions referred for a preliminary ruling

10 Interedil was constituted in the legal form of a "società a responsabilità limitata" (limited liability company) under Italian law and had its registered office in Monopoli (Italy). On 18 July 2001, its registered office was transferred to London (United Kingdom). On the same date, it was removed from the register of companies of the Italian State. Following the transfer of its registered office, Interedil was registered with the United Kingdom register of companies and entered in the register as an "FC" (foreign company).

11 According to the statements made by Interedil as set out in the order for reference, at the same time as the transfer of its registered office, it was engaged in transactions which concluded in Interedil being acquired by the British group Canopus, contracts being negotiated and entered into for the transfer of a business concern. According to Interedil, a few months after the transfer of its registered office, the title to properties which it owned in Taranto (Italy) was transferred to Windowmist Ltd, as part of the assets of the business transferred. Interedil also stated that it was removed from the United Kingdom register of companies on 22 July 2002.

12 On 28 October 2003, Intesa filed a petition with the Tribunale ordinario di Bari for the opening of bankruptcy proceedings against Interedil.

13 Interedil challenged the jurisdiction of that court on the ground that, as a result of the transfer of its registered office to the United Kingdom, only the courts of that member state had jurisdiction to open insolvency proceedings. On 13 December 2003, Interedil requested that the Corte suprema di Cassazione give a ruling on the preliminary issue of jurisdiction.

14 On 24 May 2004, without waiting for the decision of the Corte suprema di Cassazione and taking the view that the objection alleging that the Italian courts did not have jurisdiction was manifestly unfounded and that it was established that the

undertaking in question was insolvent, the Tribunale ordinario di Bari ordered that Interedil be wound up.

15 On 18 June 2004, Interedil lodged an appeal against the winding-up order before the Corte suprema di Cassazione.

16 On 20 May 2005, the Corte suprema di Cassazione adjudicated by way of order on the preliminary issue of jurisdiction referred to it and held that the Italian courts had jurisdiction. It took the view that the presumption in the second sentence of article 3(1) of the Regulation that the centre of main interests corresponded to the place of the registered office could be rebutted as a result of various circumstances, namely the presence of immovable property in Italy owned by Interedil, the existence of a lease agreement in respect of two hotel complexes and a contract concluded with a banking institution, and the fact that the Bari register of companies had not been notified of the transfer of Interedil's registered office.

17 Doubting the validity of the Corte suprema di Cassazione's finding, in the light of the criteria established by the court in In re Eurofood IFSC Ltd (Case C-341/04) [2006] Ch 508, the Tribunale ordinario di Bari decided to stay the proceedings and to refer the following questions to the court for a preliminary ruling:

"1. Is the term 'the centre of a debtor's main interests' in article 3(1) of [the] Regulation ... to be interpreted in accordance with Community law or national law, and, if the former, how is that term to be defined and what are the decisive factors or considerations for the purpose of identifying the 'centre of main interests'?

"2. Can the presumption laid down in article 3(1) of [the] Regulation ..., according to which 'in the case of a company ... the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary', be rebutted if it is established that the company carries on genuine business activity in a state other than that in which it has its registered office, or is it necessary, in order for the presumption to be deemed rebutted, to establish that the company has not carried on any business activity in the state in which it has its registered office?

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The questions referred

…..

The first part of question 1

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43 With regard in particular to the term “the centre of a debtor's main interests” within the meaning of article 3(1) of the Regulation, the court held in In re Eurofood IFSC Ltd (Case C-341/04) [2006] Ch 508, para 31 that that concept is peculiar to the Regulation, thus having an autonomous meaning, and must therefore be interpreted in a uniform way, independently of national legislation.

44 The answer to the first part of question 1 is therefore that the term “centre of a debtor's main interests” in article 3(1) of the Regulation must be interpreted by reference to European Union law.

The second part of question 1, question 2, & the first part of question 3

45 By the second part of question 1, question 2, and the first part of question 3, the Tribunale ordinario di Bari asks, in essence, how the second sentence of article 3(1) of the Regulation must be interpreted for the purposes of determining the centre of a debtor company's main interests.

46 In view of the fact that Interedil, according to the information given in the order for reference, transferred its registered office from Italy to the United Kingdom during 2001 and was then removed from the United Kingdom register of companies during 2002, it will also be necessary, in order to provide a full answer to the referring court, to identify the relevant date for the purpose of determining the centre of the debtor's main interests, so that the court with jurisdiction to open the main insolvency proceedings may be identified.

The relevant criteria for determining the centre of the debtor's main interests

47 While the Regulation does not provide a definition of the term “centre of a debtor's main interests”, guidance as to the scope of that term is, nevertheless, as the court stated in In re Eurofood IFSC Ltd, para 32, to be found in recital 13 in the Preamble to the Regulation, which states that “the ‘centre of main interests’ should correspond to the place where the debtor conducts the administration of his interests on a regular basis and [which] is therefore ascertainable by third parties”.

48 …..the presumption in the second sentence of article 3(1) of the Regulation that the place of the company's registered office is the centre of its main interests and the reference in recital 13 in the Preamble to the Regulation to the place where the debtor conducts the administration of his interests reflect the European Union legislature's intention to attach greater importance to the place in which the company has its central administration as the criterion for jurisdiction.

49 With reference to that recital, the court also stated in In re Eurofood IFSC Ltd case, para 33, that the centre of a debtor's main interests must be identified by reference to criteria that are both objective and ascertainable by third parties, in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open the main insolvency proceedings. That requirement for objectivity and that possibility of ascertainment by third parties may be considered to be met where the material factors taken into account for the purpose of establishing the place in which the debtor company conducts the administration of its interests on a regular basis have been made public or, at the very least, made sufficiently accessible to enable third parties, that is to say in particular the company's creditors, to be aware of them.

50 It follows that, where the bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions of the company are taken, in a manner that is ascertainable by third parties, in that place, the presumption in the second sentence of article 3(1) of the Regulation that the centre of the company's main interests is located in that place is wholly applicable. In such a case……it is not possible that the centre of the debtor company's main interests is located elsewhere.

51 The presumption in the second sentence of article 3(1) of the Regulation may be rebutted, however, where, from the viewpoint of third parties, the place in which a company's central administration is located is not the same as that of its registered office. As the court held in In re Eurofood IFSC (Case C-341/04) [2006] Ch 508, para 34, the simple presumption laid down by the European Union legislature in favour of the registered office of that company can be rebutted if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect.

52 The factors to be taken into account include, in particular, all the places in which the debtor company pursues economic activities and all those in which it holds assets, in so far as those places are ascertainable by third parties…… [T]hose factors must be assessed in a comprehensive manner, account being taken of the individual circumstances of each particular case.

53 In that context, the location, in a member state other than that in which the registered office is situated, of immovable property owned by the debtor company, in respect of which the company has concluded lease agreements, and the existence in that member state of a contract concluded with a financial institution—circumstances referred to by the referring court—may be regarded as objective factors and, in the light of the fact that they are likely to be matters in the public domain, as factors that are ascertainable by third parties. The fact nevertheless remains that the presence of company assets and the existence of contracts for the

financial exploitation of those assets in a member state other than that in which the registered office is situated cannot be regarded as sufficient factors to rebut the presumption laid down by the European Union legislature unless a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other member state.

***

58 As is apparent from paras 47 to 51 above, the term "centre of main interests" meets the need to establish a connection with the place with which, from an objective viewpoint and in a manner that is ascertainable by third parties, the company has the closest links. It is therefore logical in such a situation to attach greater importance to the location of the last centre of main interests at the time when the debtor company was removed from the register of companies and ceased all activities.

59 The answer to the second part of question 1, question 2 and the first part of question 3 is therefore that, for the purposes of determining a debtor company's main centre of interests, the second sentence of article 3(1) of the Regulation must be interpreted as follows:

—a debtor company's main centre of interests must be determined by attaching greater importance to the place of the company's central administration, as may be established by objective factors which are ascertainable by third parties. Where the bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions of the company are taken, in a manner that is ascertainable by third parties, in that place, the presumption in that provision cannot be rebutted. Where a company's central administration is not in the same place as its registered office, the presence of company assets and the existence of contracts for the financial exploitation of those assets in a member state other than that in which the registered office is situated cannot be regarded as sufficient factors to rebut the presumption unless a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other member state;

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INSOL INTERNATIONAL

GLOBAL INSOLVENCY PRACTICE COURSE

UNCITRAL Model Laws: An Introduction

Prof. G. Ray Warner
St. John's University

Lots of Variety Around the Globe

- What types of Systems?
  - Typically liquidation systems
  - Modern trend
    - Rescue or reorganization systems

The World is Small

- Assets can be moved easily
  - For legitimate or illegitimate reasons
- Cross-border fraud is common
  - Recovery is difficult
  - Creditors may not want to fund uncertain efforts

The World is Small II

- Business is global
  - Creditors, suppliers, investors & customers are global
- Businesses are global
  - Example – U.S. Corporation
  - NY headquarters & U.S. patents
  - Korean parts manufacturing plant
  - Mexican & Greek assembly plants
  - German, UK, Canada & U.S. stores

How do you liquidate a Global Business?

- Seven or more separate bankruptcy cases
- What if each has different rules?

Value Preservation

- What if assets are worth more if sold together
  - E.g., the Korean parts plant with the Mexican & Greek assembly plants and the U.S. patents

Worse – How Do You Save It?

- Where should you reorganize a global company?
- Can you do it?
  - What if Korea lacks a reorganization system?
  - What if it has critical differences?
    - E.g., no Debtor in Possession
    - Or different rules for patent licenses

Problem of Multi-National Companies

- Name one that isn't!
- What are the bankruptcy options
  - Territoriality vs. Universality
- Territoriality –
  - U.S. case deals with U.S. assets, Mexico case deals with Mexico assets, etc.
- Universality –
  - One case deals with all assets and all creditors

Which One is Better?

- Can you ever get to universality?
  - Loss of sovereignty
  - But – effect of convergence
    - If the law is the same everywhere, how much do you care about choice of law?
    - Still have problem of enforcement of foreign orders

EU Insolvency Regulation

- EU faced this problem first
  - How do you deal with a common market and multiple different insolvency systems?
  - You need (1) jurisdictional and
    (2) choice of law rules
- UNCITRAL Model Law
  - Much less ambitious

UNCITRAL Model Law on Cross-Border Insolvency

- Why a Model Law?
- Why not a treaty?
  - Too difficult politically
  - Also easier to make local variations
- Trade off - less uniform but wider adoption
  - Adopted in 53 States and 56 jurisdictions (Mar. '23)
  - But many have variations from uniform text

EU & UNCITRAL Adopt Modified Universality

- Which nation's insolvency proceeding should be the *main* one?
  - The main proceeding should be the one pending where the company's main interests are centered
- COMI - "center of main interest"

Main vs. Non-Main Proceedings

- Proceeding pending in the COMI is a “foreign main proceeding”
- Other proceedings are “foreign non-main proceedings”
  - But only if pending where the company has an “establishment”
- What if no establishment but only assets?
  - Model Law does not address it

Main vs. Non-Main

- This matters a lot in the EU since main proceeding orders may be binding in other EU nations

- Not as critical under Model Law
  - Nothing is “binding”

What is COMI

- COMI - “center of main interest”
  - Not defined in Model Law
  - But start with registered office presumption
- Interpretation rules
  - International origin & uniformity
    - Can look to EU Regulation
  - EU Test – Head office function
    - Plus – “ascertainable by third parties”
  - US Test – Nerve center

COMI Reconsidered

- What is the COMI of a corporate group?
- What is the COMI of an Irish subsidiary of Apple?
- How easy is it to change COMI?
  - And get a different bankruptcy outcome
  - EU "bankruptcy tourism" to the UK
- Timing of determination
- Is ascertainability really meaningful?

What Does the Model Law Do?

- Not much

  - But that is still an astounding development in international insolvency law

The Major Features

- Access to local courts
- Recognition
- Relief
- Communication and Co-Ordination

First - Access

- For insolvency administrators
  - Both inbound and outbound
    - Express authority for *local* administrator to appear in foreign courts
    - Procedures for *foreign* representative to appear in *local* courts

Access to Local Courts

- Foreign representative can sue and defend in debtor's stead
- Foreign representative can institute a local insolvency proceeding
  - Insolvency is presumed if "Main"
- Foreign representative can participate in a pending local insolvency proceeding

Access of Foreign Creditors

- Insolvency laws may treat local creditors better
  - May not even permit foreign creditors to participate
- Model Law gives foreign creditors notice and "same rights" as local creditors
- Right to distribution
  - Foreign creditors may be treated worse
    - But not worse than general unsecureds
    - Option to exclude foreign tax and social security claims

Second - Recognition

- Simply local court recognition (confirmation) that:
  - There is a foreign insolvency proceeding involving this entity,

    and
  - The Foreign Representative is the right person to represent

    that estate's interests
- This is the first issue in the case
  - Model Law says it should be quick and easy
    - But it is where you need to fight hard if you want to block local enforcement of the foreign proceeding

What is a “Foreign Proceeding”

- Collective
- Judicial or administrative proceeding
- Law relating to insolvency
- Subject to supervision of
  - Foreign judicial or other authority
- Purpose of liquidation or reorganization

Effects of Recognition

- Portal to appear in local courts
- May participate in a local insolvency proceeding
- May obtain insolvency-related relief from local courts

What Relief is Available?

- Main gets more than Non-Main
  - Lots of focus in literature

- *Automatic* relief if Main – Art. 20
  - Stay of proceedings and executions
    - Subject to local stay exceptions
      - e.g. secured credit may not be affected
  - Suspension of debtor's power to transfer property

Discretionary Relief

- But the same stay is available in Non-Main
  - Just not automatic – Art. 21
    - So how great is the difference?

- Also pre-recognition relief allowed
  - All Art. 21 relief
  - Available in Main or Non-Main

What Else Can You Get?

- Discovery
- Entrustment –
  - Entrust local assets to foreign representative!
  - Entrust *distribution* to foreign representative!!
    - Local court collects assets and sends them to foreign court to distribute under a different set of rules!

Local Insolvency Powers

- Art. 21 - "any appropriate relief" available to a local insolvency administrator
- Art. 23 use of local avoiding powers
  - US – Can't use U.S. powers
- Strategy consideration –
  - (1) file a full local proceeding, or
  - (2) seek recognition and exercise local powers
    - US – Choice of avoiding law?

Limitations in Art. 21 & 22

- Court “may” grant relief
- “Appropriate” relief
- Local creditors must be “adequately protected”
- All parties must be “adequately protected”
- May impose “appropriate” conditions

- Lots of discretion!

Main vs. Non-Main

- Relief granted should reflect the nature of the foreign proceeding
  - Relief may be more restricted in Non-Main
  - E.g. does it relate to assets that “should be administered” in the foreign Non-Main proceeding?

Enerprise Groups

- Model Law focuses on entity
  - No “Group COMI”
- Model Law on Enterprise Group Insolvency (2019)
  - No adoptions
- But might enforce “3rd Party Releases” of Affiliates
  - In COMI of parent
  - Or COMI of finance affiliate
  - Or COMI of any Group Member

Additional Powers

- Finally Art. 7 - may "provide additional assistance" under other local laws
  - U.S. version includes enforcement of foreign insolvency orders
    - E.g., enforce foreign reorganization plan against local creditors
- Model Law on Recognition and Enforcement of Insolvency Related Judgments (2018)

Manifestly Contrary to Local Public Policy

- All relief subject to Art. 6 "manifestly contrary" to local public policy
  - Should be very narrow
    - Goal is to facilitate foreign proceeding
  - Often raised but rarely applies

- Real limitation is discretion
  - Threatens to undermine goals of the Model Law

Using Foreign Law

- Is Model Law merely procedural or can it import substantive results?
- Can I use a more favorable foreign law to reorganize and then use the Model Law to enforce it locally?
- How different can the foreign law be?
- Issue – Must relief be available under forum's law, other law or both?

Co-Operation

- Let's talk
  - Court to court communication
  - Representative to representative communication

- Authority for court and insolvency representative to communicate with foreign court or foreign insolvency representative

Let's Work Together

- Courts and representatives are directed to "cooperate to the maximum extent possible"

Types of Co-Operation

- Can a US and Canadian judge hold a joint televised hearing?

- Can the courts approve agreements?
  - Common - called protocols
  - Usually procedural
    - But use of concentration account?

The Law of Nowhere?

- What law governs a cross-border case?
  - A little US
  - A little Mexico
  - A little Greek
  - A little protocol that is the law of none?

- Can you predict the outcome for your client

Recap

- The big issues
  - You can use any nation's law to handle a global case if it purports to grant jurisdiction
    - But enforcement is the problem
  - You can use the Model Law to:
    - Coordinate multiple national cases
    - Collect foreign assets and enforce your nation's bankruptcy orders in some other nations